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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID CARLTON BROWN,

Defendant and Appellant.

D045453

(Super. Ct. No. SCD178177)

APPEAL from a judgment of the Superior Court of San Diego County, Melinda J. Lasater, Judge. Reversed and remanded.

This case illustrates some of the problems that can arise when a criminal defendant represents himself and engages in obstreperous behavior. In November 2003 the San Diego County District Attorney filed an information charging David Carlton Brown in count 1 with sale of cocaine base in violation of Health and Safety Code section 11352, subdivision (a), and in count 2 with possession of cocaine base for sale in violation of

Health and Safety Code section 11351.5.<sup>1</sup> The information also alleged that Brown (1) had been previously convicted of a drug offense within the meaning of Health and Safety Code section 11370.2, subdivision (a); (2) had a prior strike within the meaning of Penal Code sections 667, subdivisions (b) through (i), 1170.12, and 668; and (3) had served a separate term of imprisonment within the meaning of Penal Code sections 667.5, subdivision (b), and 668. In early 2004,<sup>2</sup> Brown executed a *Lopez*<sup>3</sup> waiver and elected to represent himself at trial.

Brown's first trial began on July 7 and ended on July 13 when the court declared a mistrial after the jury deadlocked 11-to-1 in favor of a guilty verdict. During the trial, the court had admonished Brown several times for improper behavior. The court set the new trial for August 16.

At the July 19 readiness conference, Brown elected to remain self-represented. At that hearing, Brown requested a complete transcript of the first trial in order to prepare his defense. Although five witnesses had testified against him at the first trial (see fn. 4,

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<sup>1</sup> The information charged both Brown and a codefendant, Eddie Earl Woodruff (Woodruff), with these two offenses, as well as a third offense, possession of cocaine base in violation of Health and Safety Code section 11350, subdivision (a) (count 3). On July 6, 2004, the day before the first trial was set to begin in this matter, the court granted the People's pretrial motion to dismiss count 3. On July 7 Woodruff pleaded guilty to counts 1 and 2, and admitted certain enhancement allegations not at issue in this appeal.

<sup>2</sup> All further dates refer to calendar year 2004.

<sup>3</sup> *People v. Lopez* (1977) 71 Cal.App.3d 568.

*post*), the court ordered a transcript of the testimony of only two of those witnesses, which was provided to Brown before the second trial commenced.

The second trial began on August 17. During the course of the trial, the court ordered a transcript of the testimony of two more witnesses who had testified at the first trial, but the court denied Brown's request to postpone his questioning of one of those witnesses until the transcript was available to him. The court offered Brown the opportunity to ask the court reporter to read back any testimony Brown thought he needed to impeach the witness based on his prior testimony.

The jury convicted Brown of counts 1 and 2. The jury also found true the allegations regarding Brown's priors. The court sentenced Brown to the middle term of four years for his conviction of count 1, doubled to eight years as a result of the prior strike; imposed a term of four years for his conviction of count 2, but stayed execution under Penal Code section 654; struck the prison prior allegation; imposed a three-year enhancement under Health and Safety Code section 11370.2, subdivision (a); and sentenced Brown to an aggregate term of 11 years in state prison.

Brown contends the judgment should be reversed and the case should be remanded for a new trial because (1) the court violated his right to due process both when it refused his request to prepare a complete transcript of the first trial to assist him in his defense at the second trial, and when it denied his request for a continuance after it ordered the preparation of a supplemental transcript; (2) the court denied him his rights to due process and compulsory process to present a defense when it prematurely terminated his defense as a means (he asserts) to punish him for disruptive courtroom behavior; (3)

there was no finding that his prior assault conviction constituted a "strike" because the specific allegation in the information that the assault was a serious or violent felony was not submitted to the jury, and the jury's verdict found true only that he had been convicted of "Assault Great Bodily Injury and with a Deadly Weapon, in violation of Penal Code section 245[, subdivision ](a)(1)"; and (4) he was unconstitutionally denied a jury trial on the question of whether his prior conviction was a serious felony, and the jury's verdict was incomplete and tantamount to an acquittal such that retrial is barred by federal and state constitutional protections against double jeopardy.

We shall conclude that the court erroneously denied Brown's pretrial request for a complete transcript of the first trial, requiring automatic reversal of the judgment under the California Supreme Court's decision in *People v. Hosner* (1975) 15 Cal.3d 60 (*Hosner*).

#### FACTUAL BACKGROUND

In October 2003 San Diego Police Detective William Martinez was working as an undercover narcotics detective in a drug "buy/bust" operation in downtown San Diego when he came into contact with Brown. Detective Martinez told Brown he was "looking for 50," meaning he wanted to purchase \$50 worth of illegal narcotics. Brown asked Detective Martinez whether he wanted "rock or weed." In street terminology, "rock" means cocaine base, and "weed" means marijuana. Detective Martinez told Brown he was looking for "rock."

Brown borrowed Detective Martinez's cell phone, placed two telephone calls, and reported that he had made contact with someone who would deliver the narcotics.

Detective Martinez eventually gave \$50 in prerecorded bills to Brown to buy the narcotics. Detective Martinez observed Brown get into the rear passenger seat of a car occupied by two other people.

Another detective, James Clark, had the car under surveillance with binoculars and saw Brown extend his hand toward the front seat passenger, later identified as Woodruff (Brown's codefendant), who turned and handed something to Brown. Brown later gave Detective Martinez a plastic baggie containing 0.85 grams of cocaine base. Brown and Woodruff were arrested. An additional 3.96 grams of cocaine base was recovered from Woodruff.

## DISCUSSION

### I

#### *FAILURE TO PROVIDE A COMPLETE TRANSCRIPT OF THE FIRST TRIAL*

##### *A. Background*

At the readiness conference that preceded the second trial, Brown requested a complete transcript of the first trial in order to prepare his defense. Although five witnesses had testified against Brown at the first trial,<sup>4</sup> the court ordered a transcript of the testimony of only two of those witnesses: Detective Martinez and Officer Ward. When Brown said, "Ma'am, I'd like to have all," the court responded, "Denied. You haven't shown a basis for even . . . the ones I'm ordering for you, let alone all of this."

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<sup>4</sup> The five prosecution witnesses were Officer Alfredo Castro, Detective Martinez, Officer Dick Ward, Detective Clark, and criminalist Michael Sloneker.

At the second trial, which began on August 17, the same five witnesses testified against Brown: Officer Castro, Detective Martinez, Officer Ward, Detective Clark, and criminalist Sloneker. On the first day of trial, Brown again requested a complete transcript of the first trial. The following exchange occurred between Brown and the court:

"[Brown:] I'm going to make a motion that I request a stay in these proceedings because I didn't get my full transcripts I wished that I had.

"The Court: What transcripts are you looking for?

"[Brown:] From the last trial.

"The Court: Just give me the list of which transcripts it is that you think you're entitled to.

"[Brown:] The full transcripts of the last trial, from the whole last trial.

"The Court: What are you lacking that you don't have?

"[Brown:] Everything, from opening statements all the way to the end.

"The Court: So you believe that you're entitled to a transcript of opening statements, closing arguments, the jury instructions, everything, not just the witnesses?

"[Brown:] Yes.

"The Court: Okay. Motion denied."

When Brown attempted to impeach Detective Clark during cross-examination, he was unable to refer to a transcript of the witness's prior testimony. Noting that he lacked a transcript of Detective Clark's prior testimony, Brown tried to recall generally what this

witness had said at the first trial and encountered objections by the prosecutor, some of which the court sustained, including the objection that Brown was engaging in "improper impeachment." Specifically, the following exchanges occurred among Brown, Detective Clark, the prosecutor, and the court:

"[Brown:] "Sir, the last time you testified you didn't say anything about binoculars. [¶] I give you an offer of proof that he didn't see anything in the car whatsoever.

"[Prosecutor:] Objection.

"[Brown:] You said it was fuzzy. *If I had the transcripts right now it would state that you said you couldn't hardly see, it was fuzzy.*

"[Prosecutor:] *Objection. Improper impeachment*, compound, facts not in evidence.

"[Court:] Compound. Sustained. *And improper impeachment*. One question at a time.

"[Brown:] Okay. Let me just go back. [¶] When you were parked across [the] street, and you saw Detective Martinez, Michael Schmitt and I, we were all together, correct?

"[Detective Clark:] I don't know who Michael Schmitt is.

"[Brown:] Was there a White gentleman that was around the three of us, sir?

"[Detective Clark:] I don't specifically recall if there was or not.

"[Brown:] You stated when Mr. Woodruff pulled up, he got out of the car and he walked towards me, and me and him [*sic*] walked back towards the car?

"[Detective Clark:] That's correct.

"[Brown:] Sir, are you sure you saw exactly what happened on that time on that night, October 15th?

"[Detective Clark:] I'm absolutely sure I saw that.

"[Brown:] Okay. Do you know that [Detective] Martinez testified that when Woodruff came, he walked to them? Not actually to them, but walked up the street, looked around, walked back, got in the car, and I came down from upstairs of a bank and then joined Mr. Woodruff?

"[Prosecutor:] Objection. Foundation.

"[Brown:] I'm giving him a chance.

"[Court:] Overruled. You may answer that question.

"[Detective Clark:] No, I did not know he testified to that.

"[Brown:] *You testified to something different, though, didn't you?*

"[Prosecutor:] *Objection. Foundation, speculation.*

"[Court:] *Sustained.*" (Italics added.)

After struggling with his attempted impeachment of Detective Clark, Brown asked the court to excuse the jurors. Out of the presence of the jury, Brown told the court, "Again, I object to not having all of the transcripts." When the court asked him which transcripts he needed, the following exchange took place between Brown and the court:

"[Brown:] All the testimony of witnesses.

"The Court: You've got transcripts.

"[Brown:] I only got two transcripts.

"The Court: Which two are they?

"[Brown:] [Detective] Martinez and [Officer] Ward are the only ones you granted.

"The Court: Okay.



"[Brown:] I asked for all.

"The Court: Which other ones do you think you need? [¶] If you have a question of [Detective] Clark --

"[Brown:] I want everybody that testified. . . ."

The court then advised Brown he could impeach Detective Clark without a transcript of his prior testimony: "[Y]ou can still impeach the witness by asking him the question in a proper way, and then having the court reporter get that section and read it back to you if you feel that there's something different that he said this time than he said last time."

Eventually, the court ordered that a transcript of Detective Clark's prior testimony be prepared and provided to Brown the next day and asked Brown whether he anticipated any other inconsistent testimony. Brown asked for a transcript of Officer Castro's prior testimony, and the court ordered that it be prepared. However, the court denied Brown's request to postpone his cross-examination of Detective Clark and instructed Brown, "Finish with [Detective Clark]. I mean, you haven't—I need you to make the questions with specificity and the reasons behind it [*sic*]."

#### B. *Analysis*

"Equal protection principles demand that an indigent defendant be provided with 'a transcript of prior proceedings when that transcript is needed for an effective defense . . . ." (*People v. Tarver* (1991) 228 Cal.App.3d 954, 956 (*Tarver*), quoting *Britt v. North Carolina* (1971) 404 U.S. 226, 227 (*Britt*).)

In *Hosner, supra*, 15 Cal.3d at page 66, the California Supreme Court held that an indigent defendant, upon timely motion, is presumptively entitled to a full transcript of a prior trial upon retrial. Specifically, the *Hosner* court stated that "an indigent defendant in a criminal trial is *presumed* to have a particularized need for a transcript of prior proceedings, just as he is *presumed*, if he needs a transcript at all, to need nothing less than a complete transcript." (*Ibid.*; see also *Shuford v. Superior Court* (1974) 11 Cal.3d 903, 907 (*Shuford*); *Tarver, supra*, 228 Cal.App.3d at p. 956; *Rutkowski v. Municipal Court* (1983) 146 Cal.App.3d 248, 250-251; 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Judgment, § 35, pp. 53-54.)

The high court in *Hosner* also held that the burden is on the prosecution at the time of the defendant's timely motion for a transcript to overcome both the presumption of "[the] defendant's particularized need for the transcript [of prior proceedings]" and the presumption of "the unavailability of adequate alternative devices" that would fulfill the same functions of a transcript (hereafter the *Hosner* presumptions). (*Hosner, supra*, 15 Cal.3d at pp. 65-66, citing *Britt, supra*, 404 U.S. at p. 227 & *Shuford v. Superior Court* (1974) 11 Cal.3d 903.)

The *Hosner* court further held that a trial court's "erroneous denial of an indigent defendant's motion for a free transcript of a prior trial requires automatic reversal." (*Hosner, supra*, 15 Cal.3d at p. 70.) In creating what it called a "per se rule of reversible error relative to the denial of a transcript of a prior trial," our high state court reasoned that "in the manner of the denial of the assistance of counsel, the denial of a transcript of a former trial infects all the evidence offered at the latter trial, for there is no way of

knowing to what extent adroit counsel assisted by the transcript to which the defendant was entitled might have been able to impeach or rebut any given item of evidence. Even if an appellate court were to undertake the extraordinary burden of reviewing the records of both trials, the court would be able only to hypothesize what use at the latter trial could have been made of the transcript of the former trial. While the assessment of the prejudicial effect of error always requires some speculation by the reviewing court as to how an average jury would have decided the case in the absence of the error, an entirely new level of compound conjecture would be entailed in a court's first speculating what evidence might have been impeached, and how, and only then speculating how the trier of fact would have reacted to the speculated efforts at impeachment." (*Ibid.*)

Here, Brown made a timely request on July 19, about one month before the second trial commenced on August 17, for a complete transcript of the first trial, which included the testimony of the five witnesses who had testified against him. Brown indicated to the court that he needed the transcript to prepare his defense. The People do not dispute that Brown was indigent for purposes of determining his right to a transcript. During the second trial, Brown again demonstrated his need for the transcript during his cross-examination of Detective Clark (discussed, *ante*). On appeal, the People acknowledge that this court must follow *Hosner*. We hold that Brown was presumptively entitled to a complete transcript of his first trial. (*Hosner, supra*, 15 Cal.3d at p. 66.)

Since Brown had made a showing of necessity for the transcript to cross-examine the prosecution's witnesses, and he was presumptively entitled to a complete transcript of his first trial, the burden was on the prosecution to overcome the *Hosner* presumptions of

Brown's need for the transcript and of the unavailability of adequate alternative devices that would fulfill the same functions of a transcript. (*Hosner, supra*, 15 Cal.3d at p. 66.) The record shows, however, that here, as in *Tarver*, the prosecutor made no attempt at the time of Brown's requests "to either overcome the presumption of need or show adequate alternative devices." (*Tarver, supra*, 228 Cal.App.3d at p. 957; see also *Hosner, supra*, 15 Cal.3d at p. 66.) To paraphrase *Tarver*, throughout the proceedings, the prosecutor remained unaccountably mute on the subject of Brown's right to a transcript. Absent any showing of the prosecution which might overcome Brown's presumptive need for a transcript, we conclude that error was committed. (*Tarver, supra*, 228 Cal.App.3d at p. 957.)

On appeal, the People assert the court did not err because (1) the court ordered transcripts of the four percipient witnesses the prosecution called at the first trial (Detectives Martinez and Clark and Officers Ward and Castro), whom the prosecution also called at the second trial; and (2) the court offered Brown the opportunity to have the court reporter read back any prior testimony that Brown needed.

The People's assertions are unavailing. As already discussed, the prosecution made no attempt at the time of Brown's timely request to either overcome his presumptive need for a complete transcript of the first trial prior to commencement of the second trial or show adequate alternative devices.

Also, at the time of Brown's renewed request for a transcript during his cross-examination of Detective Clark, the prosecution failed to show, and could not show, that the court's offer to have the court reporter provide an ad hoc oral transcription of

testimony given at the first trial was sufficient to overcome the *Hosner* presumptions. In *Hosner*, the Supreme Court concluded that "the possibility of defendant's counsel securing the ad hoc oral transcription of the reporter's notes of the first trial, fail[ed] as a matter of law to prevail over defendant's presumptive need for a full transcript of his first trial." (*Hosner, supra*, 15 Cal.3d at p. 69, fn. omitted.) Citing *Britt, supra*, 404 U.S. at page 228, the *Hosner* court explained that the United States Supreme Court had "made it clear that counsel's memory, no matter how fresh [citation], and the mere suggestion of the availability of ad hoc oral transcriptions of the record of the prior proceeding, are insufficient to negate even the presumed need—let alone the demonstrated need—of an indigent defendant for a transcript of a prior proceeding." (*Hosner, supra*, 15 Cal.3d at p. 69.)

Here, unlike the defendant in *Hosner*, Brown was not represented by counsel. The record shows that his lack of a transcript of Detective Clark's prior testimony hampered his ability to cross-examine this witness. Even if the prosecutor had argued to the court that ad hoc oral transcriptions of the record of the first trial were an adequate alternative device that would fulfill the same functions of a transcript, it is a matter of pure speculation whether Brown's memory of the prosecution witnesses' prior testimony was sufficiently complete to allow him to formulate questions and then direct the court reporter to the appropriate portions of the reporter's notes of the first trial. Here, as in *Hosner*, the availability of ad hoc oral transcriptions of the record of the first trial was (to paraphrase *Hosner*) "insufficient to negate even the presumed need—let alone the

demonstrated need—of [Brown] for a transcript of [the] prior proceeding." (*Hosner, supra*, 15 Cal.3d at p. 69.)

We conclude that the court erroneously denied Brown's pretrial request for a complete transcript of the first trial, requiring reversal of the judgment under the *Hosner* per se rule of reversible error. (*Hosner, supra*, 15 Cal.3d at pp. 70-71.)

## II

### *TERMINATION OF BROWN'S DEFENSE*

Brown also contends the court denied him his rights to due process and compulsory process to present a defense when it prematurely terminated his defense as a means to punish him for disruptive courtroom behavior. Because of the disposition of this cause that must follow our conclusion that the court committed per se reversible error by denying Brown's timely request for a complete transcript of the first trial, we need not reach the merits of his claim that the court violated his constitutional rights by terminating his defense case.

### DISPOSITION

The judgment is reversed and the matter is remanded for a new trial.

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NARES, J.

WE CONCUR:

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McCONNELL, P. J.

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AARON, J.